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DIRECTION IN THE REJECTION OF A CONSTITUTIONAL AMENDMENT.

Generally, if not universally, it would be supposed that when an amendment of the constitution is proposed by referendum and fails of passage, the law stands as it did before the amendment is voted on. But the Governor of Arizona, if press dispatches report him correctly, seems to think that discretion vested in him by the old law is taken away.

For example, apparently greatly to the disgust of this Governor, the people of Arizona refused to adopt a constitutional amendment abolishing the death penalty. The Governor takes this as a direction not only that the death penalty is not to be abolished, but also that the Governor shall not exercise the clemency which the law has vested in him to commute or pardon in a particular case, or he resolves, at the expense of any applicant entitled under the law as it stands, so as to teach the people a lesson, to refuse to intervene in a meritorious case.

We would not wish to have that Governor's conscience when he is trying to shift responsibility from himself to the people who were merely passing upon a matter of general policy and not as applicable to any certain case. In its last analysis the Governor would refuse to commute though evidence should be produced to him indubitably showing that one convicted of murder was innocent. Could any one for a moment suppose that hanging should be applied to such a convict merely because the people voted that hanging should be the penalty for murder.

In 76 Cent. L. J. 1, we adverted to a similar position taken by the Governor of Oregon under the editorial title of "Lawlessness by Reformers of the Law," and we would like to ask what the Governors of either Oregon or Arizona will think they have accomplished by refusing to exercise the discretion the law vests in them? The right to exercise discretion involves the duty in a proper case to do so, and any other principle brings the law into disrepute. Instead of their action teaching observance of law and order, it suggests only that the Governor is angry, because the people do not indorse his personal views on a question of policy.

RIGHT OF SUBSCRIBER TO STOCK TO RESCIND AFTER INSOLVENCY OF BANK.

West Virginia statute provides that stockholders of a bank are liable for its liabilities "accruing while they are such stockholders." A case arose where a purchaser was misled by representations of a bank officer as to its solvency and purchased shares of its stock. As a matter of fact, the bank was at the time insolvent and in a month thereafter closed its doors. The purchaser, then sued for a rescission and the return of the consideration. It was held by West Virginia Supreme Court of Appeals that he was entitled to the relief sought. 82 S. E. 509.

The court said: "Stockholders in banks by the issuance of stock to them, or by the transfer of the stock of others to them, do not assume the so-called double liability as to debts of the bank existing prior to the issuance or transfer of the stock. They are liable only for debts accruing subsequent to their acquirement of the stock. A transferrer of bank stock remains liable for debts of the bank that accrued while he held the stock." In this case the court said it was abundantly shown that the stockholder brought his suit for rescission promptly; the stockholder did not actively participate in the management of the affairs of the bank, "and no considerable amount of the bank's indebtedness accrued while he held the

stock." Therefore, it was ruled that there was no reason for rescission to be denied.

It seems to us that, if everything is granted that the court states, yet rescission should not have been adjudged. Rather should the question of liability be worked out in the administration of the estate instead of allowing particular stockholders to obtain an absolute judgment freeing them from liability. In this way all creditors could have an opportunity of obtaining a decision apportioning liability according to the intent of the statute. Independent suits by particular stockholders but multiply litigation and interrupt the due course of administration of an insolvent estate.

But does insolvency before claim for rescission is made take away the right therefor? California's court of appeals holds just as the West Virginia case holds. People v. S. & D. Co., 126 Pac. 516. If, however, after a receivership begins all affairs of the corporation should be settled by the receiver, does not this imply that the equities of particular stockholders, so far as double liability is concerned, should be disregarded?

One buying stock and wishing to rescind for fraud and misrepresentation, it is true may sue a going concern on the principle of representations of its agent binding it. This is essentially different, however, when insolvency has intervened. The receiver represents rather the creditors than the corporation, and he takes over the assets, primary and secondary. If the intent of the statute is to fix a boundary line cutting off the right of stockholders to be relieved of their subscriptions, it is perfectly competent for it to so prescribe. No one is harmed by this kind of a rule, for a stockholder takes his chances of suing in time to save his right of rescission.

See to what a medley it reduces the statutory administration in insolvency, if some stockholders are held to their double liability for all of the unpaid debts; some for proportion of debts and some for a still less proportion, accordingly as they were created while the latter were stockholders.

It seems to us that, at all events, independent suits for rescission are not contemplated after a receivership begins, for it is only by the accounts stated in receivership it definitely may be determined when obligations accrued. And if this is true it remains to decide whether the insolvency statute considers there shall be any such ascertainment of liability as we have pointed out. The legislature ought to intend a practical statute and one escaping all questions of equities so far as stockholders are concerned.

Furthermore, it may be said that as a general proposition, taking into view ramifications in bank transactions, it would not be intended that a receivership should unravel their tangles and trace their beginning and ending.

It is, moreover, largely a fiction to attribute to creditors of a bank the having in view the solvency of its stockholders. As a fact they credit a corporation without any thought of who is behind it. In ninety-nine cases out of a hundred they do not know.

NOTES OF IMPORTANT DECISIONS

MASTER AND SERVANT—ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE DISTINGUISHED.—The Supreme Court of Wisconsin construes legislation in that state as making a distinction between assumption of risk and contributory negligence, the former being absolutely abolished in master and servant cases, and the latter also "when want of ordinary care was not wilful." It is said: "One effect of these statutes is to make it now more than formerly necessary to distinguish between assumption of risk and contributory negligence." Puza v. Hennecke Co., 149 N. W. 223.

The court further says: "From the viewpoint of their effect in defeating plaintiff's recovery, assumption of risk and contributory negligence

were formerly very much alike. They can no longer be considered from that viewpoint, because there is no common viewpoint with reference to cases arising" under this legislation. "It is quite safe to say that an intended and continued use of a known defective appliance or a known unsafe place by the employe in absolutely the same way as the employer instructed or intended it should be used falls under the definition of assumption of risk as expressed in this statute and is not to be considered contributory negligence."

As we gather this language it matters not how obviously unsafe it may be to use an appliance, or how unsafe a working place may be, under the Wisconsin statute, it comes under assumption of risk for an employe to use the appliance or work in the unsafe place. The incurring of obvious danger we have believed to come under the rule of contributory negligence, and assumption of risk merely to embrace those things in a well ordered establishment which may do harm in the course of work. This statute is construed to put all establishments whether they have safe or unsafe appliances or the place is apparently safe or obviously unsafe on the same footing under the doctrine of assumption of risk.

What then is left for contributory negligence to come into play, when the want of ordinary care is not willful? This case furnishes at least one illustration.

The employe used an obviously defective ladder by direction of a foreman for washing the windows of a building, but he placed the ladder outside of a wire fence next to the building on land of another owner, because the fence was close to the building. But he placed the ladder in a garden where the ground was lower and softer and the legs of the ladder sank into the ground somewhat. The ladder broke and the employe was thrown to the ground causing the injury sued for.

The court held it was for the jury to say whether "an ordinarily prudent person would have taken this means to efficiently perform his employer's instructions," and if so "there was no negligence on the part of plaintiff."

The court here does not say that assumption of risk is taken away by using the ladder elsewhere than on employer's property, but in a less safe place than thereon, and we judge, therefore, that it would only be as that other place increased the danger that contributory negligence could come in. In the same way we may conclude that under this statute, if an unfit tool were used in an improper way or the risk of unsafe place were increased by the user thereof, provided always want of ordinary care were willful, contributory negligence would be held as proximate cause of injury. But even under this rule, defectiveness of appliance or unsafeness in place might cut some figure.

CONSTITUTIONAL LAW—CARRYING A RED FLAG IN THE STREET.—The Supreme Judicial Court of Massachusetts sustaining the constitutionality of a statute prohibiting the carrying of a red or black flag, or any banner or sign bearing on it any inscription opposed to organized government, or which is sacrilegious or which may be derogatory to public morals, construes it as not requiring that a red or black flag shall contain any inscription at all. For a flag to be of a forbidden color is what is meant, and that it may be the flag of a society, of a political party, a social organization, a secret society or a beneficial organization makes no difference. Com. v. Karvonen, 106 N. E. 556.

As showing that under this interpretation the statute is constitutional it was observed that: "It is said in Webster's Dictionary that "historically a red flag (the kind involved) has been a revolutionary and terroristic emblem.' In the Century Dictionary is found this: 'A red flag is a flag of a red color with or without devices associated with blood or danger.' Other lexicographers give similar definitions. In the light of this well recognized significance of the red flag, it may be assumed that the Legislature regarded it as the symbol of ideas hostile to established order, and decided that its carrying in parades would be likely to provoke turbulence or to menace the safety of travelers or citizens in general, or otherwise to interfere with the common welfare. Its determination in this regard cannot be pronounced by the courts contrary to the fundamental law, as being arbitrary and unreasonable or as having clearly no relation to the ends for which the police power may be exercised."

It is a little singular to see a red flag organization which is against all law appealing to constitutional law to protect its rights. The court, however, need not have appealed to dictionaries, but rather to its judicial knowledge—much superior to any dictionary—as to the meaning of the flaunting of emblems in the air. Police power is a very broad power under the rule laid down by Justice Holmes in the Bank Guaranty law case from Oklahoma.

GAMING—RECOVERY OF STAKE FROM A "BUCKET-SHOP."—It is the rule in Pennsylvania that a recovery may be had from a stakeholder in a gambling contract, where the stake has not been turned over, even though the contingency upon which a wager is made has actually happened. But where there was a deposit made with a bucket shop keeper in

which the real transaction was a daily settlement of differences in fluctuations on the New York Stock Exchange, this was not like a case of one being a mere stakeholder who is supposed to stand indifferent between the parties as said by Pennsylvania Supreme Court. Davis v. Fleshman, 91 Atl. 489.

As to such a transaction the court says: "This deposit was made with the defendants to secure them in their winnings. * * * When the bet was won by the defendants, it automatically passed to and went into the possession of the defendants. The transaction was then closed, and the defendants no longer held the deposit awaiting the happening of the contingency which determines their right to the deposit. They were not stakeholders who were disinterested in the result of the bet and who held the fund for the successful party to the wagering contract. They were parties to the illegal transaction and held the deposit as winners of the bet." The principle *in pari delicto* was applied and right of action denied.

It was argued that the evidence did not show that any transactions were actually closed, but the court regarded such an inquiry as immaterial. This seems true and the actual entry into such transactions takes away all locus poenitentiae therein.

INJURIES TO STREET CAR PASSENGERS IN BOARDING AND ALIGHTING.—PART I.*

Inception of Liability.—Ordinarily the relation of carrier and passenger, in so far as railways operated in city streets for the carriage of local passenger traffic is concerned, commences when a person attempts to board a car as a passenger, those in charge of the car having indicated an express or implied acceptance of him as such.[1]

Consequently the liability of the company for injuries sustained by a passenger owing to the negligence of its employes attaches at the same instant; that is at the inception of the contract of carriage. In this connection it must also be borne in mind that the converse of this proposition is true, viz. that until such relation is created no liability can attach. True it is sometimes difficult to determine when this relation begins, but as is said in a case in Missouri, "one test alike applies to all, and that is the relation can only be created by contract between the parties, express or implied. There must always be an offer and request to be carried on one side, and an acceptance on the other. * * * It is true that the acceptance must in many cases be implied."[2]

So a person who is upon the street approaching a car, even though he has the intention of becoming a passenger does not, either by the mere act or intent alone, become one so as to create towards him on the part of the carrier, the obligation which the latter owes to a passenger. His status is that of a traveler to whom the company owes the same obligation which it owes to any other traveler upon the street. He is not upon the premises of the carrier, but rather upon the public highway where he may be independent of any intention to become a passenger. He has in no way become obligated to pay his fare so as to entitle the carrier to demand it, or to in any way control his action. Therefore the relation of carrier and passenger not having been created the company cannot be held liable for any injury sustained by him before he reaches or comes in contact with the car.[3]

Of course, in the case of a suburban railway a different situation may exist as where it provides stations and platforms for the accommodation of intending passengers. Here the relation of carrier and passenger may arise while the person is in the station or on the platform waiting for an approaching car with the intention of boarding it. In such case the company's liability commences with the inception of the relation

*Part II of this article will appear in next week's issue.

(1) Neely v. Louisville & S. L. Tr. Co. (Ind. App. 1913) 102 N. E. 455; Davey v. Greenfield & S. F. St. Ry. Co. 177 Mass. 106, 58 N. E. 172; Fields v. Metropolitan St. R. Co., 169 Mo. App. 624, 155 S. W. 845; Schepers v. Union Depot Ry. Co., 126 Mo. 665, 29 S. W. 712, 5 Am. Elec. Cas. 398.

(2) Schepers v. Union Depot Ry. Co., 126 Mo. 665, 672, 29 S. W. 712, 5 Am. Elec. Cas. 398 per MacFarlane, J.

(3) Duchemin v. Boston Elec. Ry. 186 Mass. 353, 71 N. E. 780.

and not from the time of attempting to enter the conveyance.[4]

The fact, however, that a person is upon the premises of the carrier, such as a platform provided for intending passengers, and while there awaiting the approach of a car for the purpose of taking passage, is injured, yet the company, not being an insurer, cannot from this fact alone be held liable for any injury sustained unless the evidence shows a want of proper care on its part.[5]

Attempting to Enter Car on Wrong Side.—A carrier cannot be expected to anticipate all contingencies which may arise by attempts of passengers to improperly board a car. Here we have the application of the principle just stated, viz. that there must be an offer and acceptance to create the relation of carrier and passenger. Accidents from this cause arise more frequently from attempts of persons to board cars operated for summer traffic. During this season of the year it is the practice in many cities to use cars which are open on both sides, having a barrier on each side which is lowered or raised according to the direction in which the car is proceeding. These cars are also equipped with a running board along the side which is also similarly lowered or raised. Entrance to the car as well as exit therefrom is properly by the lowered running board.

A person is not, however, in all cases guilty of such negligence as a matter of law as will preclude recovery from the fact that he attempts to enter the car from the side opposite to that upon which the barrier is down. Circumstances may be such that the employees in charge of the car may, after notice of the fact that a person is so attempting to enter, be guilty of such negligence as to render the questions of negligence and contributory negligence ones for the jury to determine.[6]

Similarly where a boy was in the habit of entering the car at the front end on the side next to a parallel track and while waiting for that purpose the motorman of an approaching car which had slowed up said "Get on kid," and as he had one foot on the step, the car suddenly started throwing him to the pavement, the case was held to be one for the jury.[7]

While this may be true, yet it would seem, and is undoubtedly the law, that where the company has no notice of such contemplated action by one intending to become a passenger it will not be liable for any injury sustained by a person attempting to board a car in this manner.

Starting a Car While Boarding.—Many injuries are sustained by passengers owing to the sudden starting of a car while attempting to board it. It is a common practice for those in charge to start not only before a passenger has become seated, but generally before he has actually entered the car and frequently as he is in the act of stepping upon the platform thereof. While it is undoubtedly true that as a general proposition it is not negligence per se to start before a passenger is seated,[8] yet there are without question circumstances which would render the company liable for such a course of action if injury results. Thus this would be the case where the passenger may be so infirm by reason of infancy, old age, sickness, lameness or other cause that the carrier is chargeable with notice of such infirmity and of the consequent result of what the ordinary movement of the car would be if such person were not seated.[9]

(4) Great Falls & O. D. R. Co. v. Hammerly, 40 App. D. C. 196.

(5) Egner v. United Ry. & Elec. Co., 98 Md. 397, 56 Atl. 789.

(6) Kelly v. Consolidated Traction Co., 62 N. J. L. 514, 41 Atl. 686, 5 Am. Neg. Rep. 514.

(7) Fults v. Metropolitan St. Ry. Co., 164 Mo. App. 101, 148 S. W. 210.

(8) Benjamin v. Metropolitan St. Ry. Co. 245 Mo. 598, 151 S. W. 91; Herlbick v. North Jersey St. Ry. Co., 67 N. J. L. 574, 52 Atl. 357, 12 Am. Neg. R. 334.

(9) Herbuck v. North Jersey St. Ry. Co., 67 N. J. L. 574, 52 Atl. 357, 12 Am. Neg. R. 334.

It would of course not be practicable to require that in all cases a street car should remain still until a passenger has become seated but "there are instances in which a car should be permitted to remain still until the passenger is seated; that is, where the passenger is old, feeble, crippled or in any condition which makes it reasonably apparent to those in charge of the car that the person needs unusual care and precaution for his or her protection."[10]

Similarly a violent start before passengers are seated of such force as to throw and injure them will render the company liable.[11]

Aside from this class of cases there is also that of persons who are injured by the sudden starting of the car while in the act of boarding. In cities of any considerable size it continually occurs that at certain hours of the day there are places where several persons are waiting with the intention of entering the conveyance. Under such circumstances it is the duty of those in charge of the car (this duty is usually imposed upon the conductor since he is the one who gives the starting signal), to take notice of the fact that people are so waiting, an indication by some one or more having been given of a desire to take passage, and to observe whether all who have such an intention and are apparently carrying it into effect, are in a position of safety. If regardless thereof and while a person is so boarding the car and is in a position of danger it is considered an act of negligence on the part of the company for the motorman to suddenly and violently start the car of his own volition or for the conductor to give the signal to start in pursuance of which the motorman acts.[12] A reasonable opportunity for intending passengers to board the car must be given,[13] whether they are boarding the car at a regular stopping point or at a place other than that when the stop is made in response to a signal.[14] On the other hand it is essential in order to render the company liable that those in control of the car must have notice or reasonable means of notice of an intention to board the car.[15]

Boarding Moving Car.—The rule as generally stated is that it is not negligence per se for a person to board a moving car[16] but that the question of negligence is one for the jury[17]. In determining the liability of a street railway company for injuries received by a person in attempting to board a moving car any one or more of several elements may be controlling. Of course the fact that the car was moving may be some evidence of negligence[18]. The rate of speed at which it was moving is one of the most important considerations. If moving at a rapid rate then it might be, and it would seem that it should be, regarded as negligence per se, for one to attempt to board it. It is impossible to draw any

(10) Bennett v. Louisville Ry. Co., 122 Ky. 59, 90 S. W. 1052, per Nunn, J.

(11) Gabriel v. Metropolitan St. Ry. Co., 164 Mo. App. 56, 148 S. W. 168.

(12) Connecticut: Post v. Hartford St. Ry. Co., 72 Conn. 362, 44 Atl. 547. Indiana: Neeley v. Louisville & S. L. Tr. Co., (App. 1913), 102 N. E. 455. Kentucky: Samuels v. Louisville Ry. Co., 151 Ky. 90, 151 S. W. 37. Missouri Fields v. Metropolitan St. Ry. Co., 169 Mo. App. 624, 155 S. W. 845; O'Mara v. St. Louis Transit Co., 102 Mo. App. 202, 76 S. W. 780. New York: MacKenzie v. Union Ry. Co. 178 N. Y. 638, 71 N. E. 1134. Pennsylvania: McCurdy v. United Traction Co., '15 Pa. Super. Ct. 29.

(13) Formiller v. Detroit United Ry. 164 Mich. 653, 130 N. W. 347; Neeley v. Louisville & S. L. Tr. Co. (Ind. App., 1913), 102 N. E. 455; Masterson v. Crosstown St. Ry. Co., 201 N. Y. 499, 94 N. E. 1086; Citizens Ry. Co. v. Farley, (Tex. Civ. App., 1911), 136 S. W. 94.

(14) Moffitt v. Connecticut Co., 86 Conn. 527, 86 Atl. 16; Devroe v. Portland Ry. L. & P. Co., 64 Oreg. 547, 131 Pac. 304.

(15) Moffitt v. Connecticut Co., 86 Conn. 527, 86 Atl. 16; Perkins v. New Orleans Ry. & L. Co., 127 La. 177, 53 So. 484; Fields v. Metropolitan St. Ry. Co., 169 Mo. App. 624, 155 S. W. 845.

(16) Cicero & Proviso St. Ry. Co. v. Meixner, 160 Ill. 320, 43 N. E. 823, 31 L. R. A. 331, 6 Am. Elec. Cas. 404; Schmidt v. North Jersey St. Ry. Co., 66 N. J. L. 424, 49 Atl. 438.

(17) Carlin v. West End Ry. Co., 154 Mass. 197, 27 N. E. 1000, 4 Am. Elec. Cas. 406; Omaha St. R. Co. v. Martin, 48 Nebr. 65, 66 N. W. 1007, 6 Am. Elec. Cas. 417; Compare Bradley v. Philadelphia Rap. Tr. Co., 232 Pa. 127, 81 Atl. 187.

(18) Schepers v. Union Depot R. Co., 126 Mo. 665, 129 S. W. 712, 5 Am. Elec. Cas. 398.

uniform dividing line, however, between different rates so as to create an absence of negligence on the one side and an existence thereof on the other since there are always other elements to be considered. Among these are the physical condition of the person, whether he be vigorous and active, or, on the other hand, enfeebled or weakened by reason of age or some infirmity; the condition of the street or place at which he attempts to board the car such as whether some appreciable degree of danger is added owing to the existence of snow, ice, water, excavations, obstructions and the like; the fact of his being encumbered to a considerable extent with bundles or packages so as to impede the free exercise of his physical powers; a considerable number of persons on the platform or steps; thus rendering it difficult to obtain a position of safety; and standing forth most prominently of all in every case is the fact of whether there was any express or implied invitation to board the car so as to create the relation of carrier and passenger. In view of some one or more of these elements must the question of negligence be determined. In this connection it is also to be noted that in cities of any considerable size it is a frequent if not common practice to decrease the momentum of the car as it approaches a place where some intending male passenger is waiting, tacitly inviting him to board the car without bringing it to a full stop.[19] Ordinarily with the car thus running at a slow rate of speed it would not be negligence to attempt to board it. If, however, under such circumstances a person apparently vigorous yet handicaped by some infirmity such as rheumatism or the like which is not apparent until he attempts to move should endeavor to board even a slow-moving car it might be regarded as negligence per se. And in any event the mere slackening of the rate of speed is not of itself an invitation to board the car. There must be some other indication on the part of those in charge of the car to accept such person as a passenger after being apprised in some way by him of a desire to become one.[20] And where only one inference can reasonably be drawn from the facts it seems that the question of negligence or no negligence may be determined by the court as one of law.[21].

Boarding Car by Front Platform.—The fact that a person boards a car by the front platform instead of the rear one is not negligence per se, there being no apparent reason why the former way is not as safe as the latter and there being furthermore no notice forbidding such an act or any objection thereto on the part of those in charge of the car.[22]

In fact, in many cases it is a common practice for passengers to enter a car either at the front or rear end and frequently even though there may be gates upon the front platform which are closed upon both sides, an express invitation to enter by the front platform is extended to intending passengers by the act of the motorman in opening the gate on the proper side for the entrance of persons, thus accepting them as passengers and creating the contract relation between them and the company. Aside from this, however, in the absence of any express affirmative act on the part of the motorman a person attempting to so board a car is not guilty of negligence per se, the car having stopped, if the motorman ought in the proper discharge of his duty to have been aware of his presence. Thus it has been held proper to refuse to grant request to instruct that "the defendant is not chargeable with negligence if the motorman started the car while the plaintiff was attempting to board it by the front plat-

(19) Cicero & Proviso St. R. Co., 160 Ill. 320, 43 N. E. 823, 31 L. R. A. 331, 6 Am. Elec. Cas. 404.

(20) Schmidt v. North Jersey St. Ry. Co., 66 N. J. L. 424, 49 Atl. 438; Bachrach v. Nassau Elec. R. Co., 35 App. Div. (N. Y.) 633, 54 N. Y. Supp. 958.

(21) Citizens St. R. Co. v. Spahr, 7 Ind. App. 23, 33 N. E. 446, 4 Am. Elec. Cas. 416.

(22) Townsend v. Binghampton R. Co., 57 App. Div. (N. Y.) 234, 68 N. Y. Supp. 121.

form, if he was not aware of the plaintiff's presence there." The court said: "This request was properly refused; it is seen at a glance that the request limits defendant's liability to the knowledge of the motorman, thus entirely excluding any consideration of the circumstances which tended to show that if the motorman had properly discharged his duty he ought to have known of plaintiff's presence. Such rule, if adopted, would have permitted the motorman to have been guilty of gross dereliction of duty, whereby he placed it beyond his power of being cognizant of plaintiff's presence, and then allege such negligence as a defense, because thereby he was deprived of knowlege of plaintiff's presence at the car."[23]

If however, the car is moving when a person attempts to board it by the front platform, it seems that he may be held to a greater degree of care than if he had attempted to enter it under the same condition from the rear.[24]

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(23) Pfeffer v. Buffalo Ry. Co., 4 Misc. R. (N. Y.) 465, 24 N. Y. Supp. 490, 4 Am. Elec. Cas. 439, aff'd 144 N. Y. 636, 39 N. E. 494.

(24) Paulson v. Brooklyn City R. Co., 13 Misc. R. (N. Y.) 387, 34 N. Y. Supp. 244, 5 Am. Elec. Cas. 419.

INSURANCE—ACCIDENT.

SMITH v. TRAVELERS' INS. CO.

Supreme Judicial Court of Massachusetts, Suffolk. October 24, 1914.

106 N. E. 607.

Insured was in the habit of using a nasal douche, which on one occassion he sniffed into his nostril more violently than usual, thereby drawing streptococcus germs into the middle ear, whence they penetrated through the mastoid bone into the brain, causing spinal meningitis, from which he died. Though the particular inhalation was more violent than usual, it did not appear that it was more violent than he intended it to be, or that there was any shock making him draw a deeper breath than he intended to draw. Held that, while an unbroken string of causation might be found between the too violent inhalation and the ensuing death, there could be no recovery under a policy insuring against death from injuries effected through external, violent and accidental means, since it is not sufficient that the death or injury be an accidental result of external cause, as the cause must be not only external and violent, but also accidental, and the external act was not accidental, but exactly what it was designed to be.

SHELDON, J. (1) The deceased, whose life was insured by the defendant against some risks, died from spinal meningitis. This disease, according to the plaintiff's evidence, was caused by the presence of streptococcus germs in the brain. The germs had penetrated into the brain from the middle ear through a hole in the mastoid bone. They had been carried into the ear from the outer nose, through the Eustachian tube, by a nasal douche which the deceased was using for catarrh, as he had been in the habit of doing, and which on this occasion he had "sniffed" or drawn into his nostril less gently or harder or more violently than he usually did. Streptococcus germs are among the most virulent and dangerous germs known; but they are found somewhat frequently in the outer nose, and might remain there indefinitely without harm. The nasal douche used by the deceased was harmless in itself; but the harm was done by the fact that he drew it too violently into his nostril, by reason whereof it reached the Eustachian tube and was carried into the middle ear, and thence penetrated into the brain. That there should be a hole or perforation in the mastoid bone through which pus or germs could pass from the ear into the brain is a very rare occurrence, in only one of about 1,000 skulls.

The policy insured the deceased against "bodily injuries effected directly and independently of all other causes, through external, violent and accidental means," and against death resulting "from such injuries alone" within a stated time not now material.

In an ordinary civil action under like circumstances, there would be no difficulty in saying that there could be found to have been an unbroken string of causation between the too violent inhalation of the nasal douche and the ensuing death. The too violent inhalation carried the streptococcus germs with the douche into the Eustachian tube, and everything else followed naturally. The presence of these germs in a place where, however virulent in themselves, they were harmless, and the existence of the perforation in the mastoid bone, could be found to have been conditions rather than operating causes of the illness and death. If there-

fore it can be said that this too violent inhalation effected a bodily injury through "external, violent, and accidental means," that it was itself such a means of injury, the first and chief obstacle to the plaintiff's recovery would be removed. This is the doctrine of many of the decisions relied on by her. Freeman v. Mercantile Accident Association, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753; McGlinchey v. Fidelity & Casualty Co., 80 Me. 251, 14 Atl. 13, 6 Am. St. Rep. 190; Ludwig v. Preferred Accident Ins. Co., 113 Minn. 510, 130 N. W. 5; United States Mutual Accident Association v. Barry, 131 U. S. 100, 121, 9 Sup. Ct. 755, 33 L. Ed. 60; Preferred Accident Ins. Co. v. Muir, 126 Fed. 926, 61 C. C. A. 456; Manufacturers' Accident Indemnity Co. v. Dorgan, 58 Fed. 945, 954, 7 C. C. A. 581, 22 L. R. A. 620; Winspear v. Accident Ins. Co., 6 Q. B. D. 42; Lawrence v. Accidental Ins. Co., 7 Q. B. D. 216; Hamlyn v. Crown Accidental Ins. Co. (1893) 1 Q. B. 750; Brittons v. Turvey (1905 1 K. B. 233.

But there was nothing accidental in the inhalation of this douche. The deceased did exactly what he intended to do. This particular act of inhalation, though harder or more violent than usual, was not, so far as appears, harder or more violent than he intended it to be. There was no shock or surprise during the inhalation which made him draw a deeper breath than he intended to draw, nothing strange or unusual about the circumstances. The external act was exactly what he designed it to be, though it produced some internal consequences which he had not foreseen. Accordingly there was no bodily injury effected through a means which was both external and accidental. But it is only for a death resulting from injury effected through such means that the defendant is made responsible by the policy. It is not sufficient that the death or the illness that caused the death may have been an accidental result of the external cause, but that cause itself must have been, not only external and violent but also accidental. Hatch v. United States Casualty Co., 197 Mass. 101, 104, 83 N. E. 398, 14 L. R. A. (N. S.) 503, 125 Am. St. Rep. 332, 14 Ann. Cas. 290; Cobb v. Preferred Mutual Accident Association, 96 Ga. 818, 22 S. E. 976; Hastings v. Travelers' Ins. Co. (C. C.) 190 Fed. 258; Lehman v. Great Western Accident Association, 155 Iowa, 737, 133 N. W. 752, 42 L. R. A. (N. S.) 562; In re Scarr & General Accident Assurance Corp. (1905) 1 K. B. 387.

In Healey v. Mutual Accident Association, 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. Rep. 637, the deceased did not know that what he drank was a poison; he took and drank it accidentally. In Jenkins v. Hawkeye Commercial Men's Association, 147 Iowa 113, 124, N. W. 199, 30 L. R. A. (N. S.) 1181, the swallowing of the fishbone that caused the death of the insured was a mere accident. In Maryland Casualty Co. v. Hudgins, 97 Tex. 124, 76 S. W. 745, 64 L. R. A. 349, 104 Am. St. Rep. 857, 1 Ann. Cas. 252, the oysters which caused the death were eaten by the deceased in ignorance of their unsound condition. In Paul v. Travelers' Ins. Co., 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758, the deceased had no intention of inhaling the gas which caused his death. None of these decisions is inconsistent with the view which we take of the case at bar.

In Delaney v. Modern Accident Club, 121 Iowa 528, 97 N. W. 91, 63 L. R. A. 603, the defendant was held because it was the external physical injury, and not the death as distinguished from the injury, which was accidental. In Rodey v. Travelers' Ins. Co., 3 N. M. (Gild.) 543, 9 Pac. 348, Preferred Accident Ins. Co. v. Patterson, 213 Fed. 595, —— C. C. A. —, and American Accident Ins. Co. v. Reigart, 94 Ky. 547, 23 S. W. 191, 21 L. R. A. 651, 42 Am. St. Rep. 374, there was evidence that the original injury was accidental. That was the finding made in Bohaker v. Travelers' Ins. Co., 215 Mass. 32, 102 N. E. 342, 46 L. R. A. (N. S.) 543; and this court decided that the evidence justified the finding.

We do not consider the cases in which it was contended, under various clauses in policies of insurance against accidents, that a death was due to a prior disease or infirmity, and not directly or exclusively to the happening of an accident. Those cases are not applicable here.

We cannot find that there was any "external, violent, and accidental means" producing the injury which caused the death other than this inhalation by the deceased of the nasal douche, which he took, not accidentally in any sense of that word, but purposely with full knowledge of its character and in the very way in which he intended to take it.

(2) The burden was upon the plaintiff to show that the death resulted from bodily injuries "effected directly and independently of all other causes, through external, violent, and accidental means." Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308. That she has failed to do. It follows that judgment must be entered on the verdict for the defendant.

So ordered.

NOTE.—*Unexpected Effect of an Intended Act as Being Accidental.*—The instant case, it is perceived, states the matter in such a way as to

make it difficult to say whether it reasons or assumes what is necessary to its conclusion. Thus it says: "There was no shock or surprise during the inhalation which made him draw a deeper breath than he intended to draw." But it was not intended by him (plaintiff) to draw a breath deep enough to cause internal injury.

The facts in Re Scarr, 1 K. B. 387, showed violent exertion in an attempt to eject a drunken man from a master's premises. This produced a strain on the heart, causing insurer's death. One may imagine a distinction here in the fact that the action exerted was wholly independent of the result produced on the actor.

The case of Hatch v. Casualty Co., 107 Mass. 101, 83 N. E. 398, 14 L. R. A., N. S. 503, 125 Am. St. Rep. 332, 14 Ann. Cas. 290, cited by the instant case does not appear to have any bearing on the question involved.

Also the case of Cobb v. Preferred Mutual Acc. Asso., 96 Ga. 818, 22 S. E. 976, may be distinguished in the fact that insured was doing something that could be done or was anticipated to be done only in the way it was done, to-wit: carrying his baggage to a train. This exertion was claimed to cause the loss of an eye.

The case of Hastings v. Traveler's Insurance Co., 190 Fed. 258, seems more nearly to be in strict line with the instant case, except that deceased did precisely what was necessary to be done to effect a change of position while reclining in a Morris chair.

Lehman v. Accident Asso., 155 Iowa 737, 133 N. W. 752, 42 L. R. A. (N. S.) 562, offers a possible distinction in the same way as does the Scarr case, the exertion was voluntary and to accomplish a result on something external to insured's body. The insured strained himself in bowling.

The case of Clidero v. Scottish Acci. Ins. Co., 19 R. 355, 29 Scot. L. R. 303, shows that a stout man twisted his colon while stooping to pull on his socks. The injury was held not accidental, and the argument used parallels that in the instant case.

McCarthy v. Travelers' Ins. Co., 8 Biss. 362, Fed. Cas. 8,682, may be distinguished as the Lehman and the Scarr cases. The injury was a rupture from exercise with Indian clubs.

Hamlyn v. Crown Acci. Ins. Co., 1 Q. B. 750, closely resembles the Clidero case, *supra*. In it assured was shown to attempt to pick up a marble rolling away from him. He separated his knees, leaned forward and made a grab and wrenched his knee, dislocating a cartilage. This was held to be accidental because insured did not mean to wrench his knee and such a wrench would not be the ordinary result of his action. This case is quite hard to reconcile with the Scarr case decided thirteen years later.

In Pervangher v. Casualty & Surety Co., 85 Miss. 31, 37 So. 461, one count of a petition alleged that death was caused by a strain in lifting heavy machinery, which, while being so lifted fell and struck assured. The count was held good against demurrer. Here the unexpected happened, and was not, therefore, within the voluntary exposure.

Summers v. Fidelity Ins. A. Asso., 84 Mo. App. 605, was a strain case simply. Hernia resulted. The court said: "There is no doubt that in this case the death was caused by hernia, but it was hernia which was itself caused by an accident." This is totally opposed to the instant case.

And so is the case where one accustomed to lift heavy weights assisted another and had to stand on top of a pile and reach below his feet to pick up a bar. Dilatation of the heart thus caused was held to be accidental. Horsfall v. Pac. Mut. L. Ins. Co., 32 Wash. 132, 63 L. R. A. 425, 98 Am. St. Rep. 846, 72 Pac. 128.

The case of Young v. Ry. Mail Asso., 126 Mo. App. 325, 103 S. W. 557, shows quite a full discussion of the subject and much citation of authority. The conclusion was drawn, according to the great weight of authority, that one injured by a strain in the performance of his duties suffers an accidental injury, though nothing unusual occurs to bring on the strain.

Some cases require that in the voluntary doing of the work that results in injury, something must occur that was unexpected and which really brought on the injury. Of these are U. S. Mut. Acc. Asso. v. Barry, 131 U. S. 100, 33 L. Ed. 60; Standard L. & A. Ins. Co. v. Schmalz, 66 Ark 588, 53 S. W. 49, 74 Am. St. Rep. 112.

The instant case presents, however, some basis for distinction in all of the cases in the fact that insured was performing an act upon himself and he did not mean to perform it in a way that would result in injury to himself. In this way the over-exertion in the performance could not be held to be voluntary. There are such close distinctions respecting the unexpected in the performance of acts not expected to require unusual exertion as regards things external to one's body, that it would seem admissible to draw the distinction we allude to in such circumstances as the instant case reveals. We find no case precisely on all fours with the instant case. C.

ITEMS OF PROFESSIONAL INTEREST.

INTERNATIONAL LAW NOTES ON THE WAR.

The Defense of the Suez Canal.

The validity of the measures which the Egyptian government recently took to clear the ports of the Suez Canal of the German merchantmen which were lying up there for refuge and impeding the ordinary commercial use of the waterway has received a further justification this week by the grave development of affairs in the Near East. The Ottoman Empire is now at war with England, and the safety of the international canal is threatened by the power which was originally designated as its protector. Turkey's place, however, as the

territorial sovereign of the country through which the canal is cut, has been taken by England in virtue of her protecting function in Egypt; and it is to the English fleet and the English army now, as in 1883, at the time of the Arab rising, that the defense of the highway of nations is entrusted. Had the German ships been left in port, it is not at all unlikely that they would have chosen this moment for working mischief; and, by sinking themselves in the narrow channel, have struck a terrible blow at the world's and especially at England's commerce. But as the agents of the powers in Cairo, who are the chosen council for the protection of the canal in times of emergency, confirmed England's right to take exceptional steps against the danger that lay in the ports, so now, doubtless, they will confirm our right to ward off by all possible means the danger that moves from the desert. According to the stipulations of the Convention of Constantinople, 1888, to which Great Britain adhered in 1904, (1) no act of hostility is allowed either inside the canal or within three miles of its ports; (2) belligerents' men-of-war and their prizes may not stay longer than 24 hours, except in case of absolute necessity, within the harbors of Port Said and Suez; and (3) belligerents may not station men-of-war in these harbors. These provisions are declared to apply even if Turkey is a belligerent, and so, too, if Egypt is at war; but the most authoritative of English jurists, the late Professor Westlake, suggested that they do not prevent the power which is best able to safeguard the freedom of the canal from taking any measures necessary to that end, even if they are not in accordance with the provisions. At the time of the Arabi revolt England found it necessary to land troops at Ismailia to check any attempt at wrecking, and she may now have to keep her warships in the waterway and its ports and to fortify the banks. We have not protested against the American claim to fortify the entrances to the Panama Canal, because in the present weakness of treaty sanctions we recognize the need for some effective guardianship of neutralized waterways, as well as of neutralized countries. In taking whatever steps are necessary in the Suez Canal, England will be upholding public law as fully as when she went to the help of Belgium.

Revision of the Declaration of London.

The Order in Council issued at the end of last week, which promulgates two fresh lists of absolute and conditional contraband and makes certain new modifications in the Declaration of London in place of those adopted by the Order in Council of August 20, is a bold declaration of belligerent rights which may possibly be challenged by some neutral powers, but which may be justified on principle, in view of the special character of the present conflict. The list of absolute contraband contained in the declaration (which was drawn up five years ago) did not meet the actual needs of a belligerent to-day because it failed to take note of the vital part which motor traffic could play in military operations, and it likewise failed to prohibit the trade in articles which, though not immediately munitions of war, are essentially required for the manufacture of munitions. The new list remedies these defects by the inclusion of iron ore, nickel ore, unwrought copper and other metals which are compounded into explosives on the one hand, and of motor tires, rubber and mineral oils and motor spirit on the other. The only important additions to the list of conditional contraband are hides, pig-skin and leather suitable for saddlery, harness or military boots. The reasonableness of this is obvious. More striking and novel are the new rules as to destination of contraband cargo. Conditional contraband, it is said (but no doubt the rule is intended to apply likewise to absolute, and an amending order seems called for to secure this interpretation), shall be liable to capture on board a vessel "to order," or if the ship's papers do not show who is the consignee, or if they show the consignee to be in territory belonging to or occupied by the enemy. In these cases the burden of proof is on the owners of the goods to show an innocent destination. This is a new application of the doctrine of "continuous voyage" empowering a belligerent to seize cargoes on suspicion of further transport. It is also provided that, when it is proved that the enemy government is drawing supplies from or through a neutral country, a direction may be given that Article 30 of the declaration shall not apply in respect of ships bound for a port of that country; or, in other words, any contraband cargoes, whether of the absolute or conditional category, bound for that country will be liable to seizure. Whilst merchants doing contraband trade to-day are skillful enough not to make the enemy destination apparent, the belligerent can only protect himself by a more rigorous control of neutral trade on the seas which has not a clearly innocent destination, and by requiring neutral states to assist in checking the noxious trade by their subjects. A minor change is introduced by a rule which renders a neutral vessel liable to condemnation on her return voyage if she has sailed to an enemy port when her papers indicated a neutral destination. Presumably this is only to be applied when the vessel has violated a blockade or carried

contraband or performed some unneutral service.—London Law Journal.

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BOOKS RECEIVED.

New Jersey Employers' Liability Law. Containing the New Jersey Act of 1911, with all Amendments and Supplements, with Notes of New Jersey and English Decisions, also the British Workmen's Compensation Act (1906), and Collection of Forms. By William E. Holm-

wood of the Essex County Bar. Price, $3.50. Plainfield, New Jersey. The New Jersey Law Journal Publishing Co., 1914. Review to follow.

Bender's War Revenue Law, 1914. An act to Increase the Internal Revenue, and for Other Purposes. Approved October 22, 1914. Annotated, With Reference to Earlier Acts and to Other Extant Laws. Table of cases, index, etc. By the Publisher's Editorial Staff. Price, $2.00. Albany, N. Y. Matthew Bender & Co., 1914. Review will follow.

Judicial and Statutory Definitions of Words and Phrases. Second Series. Collected, Edited and Compiled by the Editorial Staff of the National Reporter System. Four volumes. Price, $24.00. St. Paul. West Publishing Company, 1914. Review will follow.

BOOK REVIEWS.

THAYER'S FEDERAL COURTS—SECOND EDITION.

Judge Amos M. Thayer's Jurisdiction of Federal Courts was long regarded as one of the most useful books under conditions existing prior to the adoption of the new Federal "Judicial Code" and the new Equity Rules extant. Judge Thayer's career as a circuit judge gave reputation to the work and his clear statement and thorough treatment of questions gave it character.

The new code and new rules, however, compelled a revision and this has been made by Mr. Byron F. Babbitt of the St. Louis Bar and United States Commissioner for the Eastern Judicial District of Missouri, the arrangement of the original text being preserved and Judge Thayer's language as far as possible being retained.

It is only necessary to say that the reviser has performed his work most excellently and has done the profession a distinct service in preserving as far as applicable the work of Judge Thayer, a judge most well beloved and respected for his character and attainments.

This revision contains the Judicial Code in its entirety and the new equity rules with annotation thereon of such cases as have appeared since their adoption.

This edition appears in law buckram cover, of typographical excellence and is sent forth by the F. H. Thomas Law Book Co., St. Louis, Mo., 1914.

HUMOR OF THE LAW.

A stolid, blank-looking Indian sat in the federal court room to be arraigned for bootlegging. His case was called. The marshal told him to stand up; but he only stared, apparently not comprehending. The marshal motioned him to rise. He stood.

"What is your name?" the judge asked.

No reply.

"Have you an attorney?"

Only a helpless stare from the Indian.

"Can you understand English?" queried the judge.

Blank silence on the part of the prisoner.

"Mr. Attorney, what is this man charged with?" asked the judge.

The district attorney stated the case.

"It seems to me," said the judge, "that this is a very trivial case. The poor thing doesn't seem to understand a word of English. He probably has no understanding that he has done wrong. Mr. Attorney, just enter a nolle prosequi in this case."

The Indian was told he could go; but stood staring and motionless. The marshal, with a gesture, ordered him to sit down. He obeyed, and stayed throughout the long afternoon session of court. In one case, the charge was similar to his own. Scott Miller, a noted local lawyer, was defending. Miller entered a plea of guilty for his client, and then made an impassioned plea for mercy. His pathos would have moved a marble statue to tears. He represented long and earnestly the wonderful virtues and manifold kindnesses of his client. When he sat down the judge said:

"Five years in the penitentiary."

Court adjourned, and as the crowd passed out the Indian followed. He walked down the steps behind Miller. Suddenly he leaned over and whispered in the attorney's ear:

"White man talk too damn much."—Green Bag.

Here is what I regard a rather unique situation in a recent domestic imbroglio in a local city court in Indiana:

A Mrs. Rose B——, sometime ago filed an affidavit charging her husband with assault and battery committed upon herself. In the affidavit is contained the following words:

"The said D. F. B—, whose true Christian name is unknown to this affiant, he being the husband of this affidavit, did then and there unlawfully, in a rude, insolent and angry manner, etc."

This couple has been married sixteen months. For a year preceding their marriage she kept house for him. This relation was evidently a very conservative acquaintanceship.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Action**—Splitting Causes.—The rule precluding a party from splitting his cause of action does not require plaintiff who has separate liens on the same realty, each of which would authorize independent relief, to present more than one of them in a single suit, though they exist at the same time and might be considered together.—Union Cent. Life Ins. Co. of Cincinnati, Ohio, v. Drake, U. S. C. C. A., 214 Fed. 536.

2. **Adoption**—Time of.—The right of an adopted child to inherit from a foster parent is determined by the law in force at the foster parent's death, and not by the law in force at the time of adoption.—Rosekrans v. Rosekrans, 148 N. Y. Supp. 954.

3. **Adverse Possession**—Statute of Limitations.—Defendant, who was in possession of land and claimed title under the statute of limitations is not in lawful possession under the statute because of a forged deed, conveying the land to her predecessor in title, where she did not know of the deed's existence.—Abeles v. Pillman, Mo., 168 S. W. 1180.

4. **Associations**—Lawful Purposes.—An association of employers may lawfully enact a by-law giving it the right to order a shutdown of the factories of its members, if the object sought to be accomplished thereby is within its lawful purposes, and the means used are lawful.—Associated Hat Mfrs. v. Baird-Unteidt Co., Conn., 91 Atl. 373.

5. **Bankruptcy**—Bulk Sales Law.—Where a bankrupt, within four months prior to the filing of a bankruptcy petition, sold his stock of merchandise, which was within the Rhode Island Bulk Sales Act, and to avoid giving a list of creditors made oath that he had no creditors connected with his business, which was false, in an objection to his discharge on the ground that he had transferred his property with intent to defraud his creditors will be sustained.—In re De Nomme, U. S. D. C., 214 Fed. 671.

6.——Jurisdiction.—The appointment of receivers for a corporation, with an injunction restraining the corporation and its creditors from interfering with the possession of the receivers, does not affect the right of the corporation or any creditor to institute proceedings to have it adjudged a bankrupt.—In re Yaryan Naval Stores Co., U. S. C. C. A., 214 Fed. 563.

7.——Preference.—A creditor of a bankrupt who, in good faith, has accepted and retained a voidable preference until deprived thereof by judgments at the suit of the trustee, may thereafter prove the bankrupt's debt to him as a general creditor and have his claim allowed.—Union Cent. Life Ins. Co. of Cincinnati, Ohio, v. Drake, U. S. C. C. A., 214 Fed. 536.

8. **Banks and Banking**—Set-Off.—Where the secured debt of an insolvent bank has been paid out of the proceeds of a portion of the securities, the remaining securities become assets of the bank, and are subject to the right of set-off existing in favor of the obligors thereon against the bank when the receiver was appointed.—Williams v. Burgess, W. Va., 82 S. E. 507.

9. **Bills and Notes**—Accommodation Indorser.—Payment by accommodation indorser of the payee held to vest him, under Negotiable Intruments Law, with all the rights of the holder in due course from whom he acquired title, including the right to enforce the note against the maker.—Lill v. Gleason, Kan., 142 Pac. 287.

10. **Carriers of Goods**—Damages.—Where a trunk containing wearing apparel is delivered to an express company without written declaration of value, but the agent is advised that the contents are very valuable, and the trunk is lost, the express company is liable for the reasonable value.—American Express Co. v. Merten, Okla., 141 Pac. 1169.

11. **Carriers of Passengers**—Commerce Act.—The word "family," in Interstate Commerce Act, prohibiting the issuance of any pass except to employes and their families, means a collective body of persons living in one house under one head, and does not include the father of an adult employe not living with him nor dependent on him.—Wentz v. Chicago, B. & Q. R. Co., Mo., 168 S. W. 1166.

12. **Charities**—Certainty in Devise.—Gift in trust to churches for the repair and maintenance of parsonages and church edifices "and secondarily for the general advancement of Christianity" held sufficiently certain as to purpose to sustain the gift.—Sandusky v. Sandusky, Mo., 168 S. W. 1150.

13.——Negligence.—The rule that a charitable institution is not liable for the negligence of its servants, provided it has used due care in selecting them, applies only to one who accepts the benefits of the charity.—Thomas v. German General Benev. Society, Cal., 141 Pac. 1186.

14. **Commerce**—Intoxicating Liquor. — The Webb-Kenyon Act, divesting liquor of its interstate character in certain cases, and prohibiting its transportation, for use in violation of

law, held not to apply to a delivery in a prohibition district, unless intended for an unlawful use, and otherwise not to remove the protection of the commerce clause, so that the Hazel Law, prohibiting delivery of liquor for any purpose except to physicians and druggists, was invalid as to a shipment for the receiver's personal consumption, recognized by the act to be lawful.—Van Winkle v. State, Del., 91 Atl. 385.

15. **Contempt**—Jurisdiction. — An affidavit, the basis of a contempt proceeding, must show facts constituting a contempt, or the court acquires no jurisdiction.—Strain v. Superior Court of Los Angeles County, Cal., 142 Pac. 62.

16. **Contracts**—Breach.—A party cannot recover for the breach of an entire contract if he has failed to perform the covenants upon compliance of which the obligations of the defendant were dependent.—Los Angeles Gas & Electric Corporation v. Amalgamated Oil Co., Cal., 142 Pac. 46.

17.——Presumption.—There is a presumption of finality attending all written contracts, and courts will not raise doubts or conjure up ambiguities in order to construe them.—Kanaskat Lumber & Shingle Co. v. Cascade Timber Co., Wash., 142 Pac. 15.

18. **Corporations**—Equity.—That a stockholder has parted with his stock does not deprive him of his right to sue, in equity for an accounting, directors who have unlawfully taken advantage of their position to his detriment. —Porter v. Healy, Pa., 91 Atl. 428.

19.——Fraud.—Where plaintiff held stock in a corporation for over two years, during which time it became insolvent, he cannot thereafter rescind for fraud in the sale of the stock.—Keyes v. Blue Bell Medicine Co., S. D., 148 N. W. 505.

20.——Notice.—Where directors knew of the execution of a note by the officer in charge of the corporate affairs, or knew of his practice of executing such notes, and acquiesced therein, the corporation is estopped to deny his authority.—German American Indemnity Co. v. State Mercantile Bank, Colo., 142 Pac. 189.

21.——Subscription.—A subscription or purchase of stock of a corporation may be rescinded for fraud, though no action is taken until a receiver is appointed, if equities of creditors will not be affected, and no debts have accrued since the subscription or purchase.—Morrisey v. Williams, W. Va., 82 S. E. 509.

22. **Courts**—Diversity of Citizenship.—The jurisdiction of a United States District Court, obtained by reason of diversity of citizenship, of a suit by a legatee against an executor in the nature of a creditor's bill, is not lost by permitting other legatees to intervene, though thereby the requisite diversity of citizenship will be lacking.—Fraser v. Cole, U. S. C. C. A., 214 Fed. 556.

23.——Stare Decisis.—Unless there is a particular reason why an erroneous decision should be followed, the court should reverse it, especially where the erroneous decision disregarded the statute and rules announced in a former opinion involving somewhat similar questions. —Imperial Securities Co. v. Morris, Colo., 141 Pac. 1160.

24. **Damages**—Action Over.—A building contractor who is responsible under the contract for damages occasioned by the construction of an extra story is liable to the owner for the amount he was compelled to pay a tenant, for damages occasioned by a defective roof built by the contractor.—Schuler v. Golden, Nev., 142 Pac. 221.

25. **Dedication**—Acceptance.—Where a statutory dedication of a street was shown, no proof of acceptance was necessary to its validity.—Keyes v. Town of Excelsior, Minn., 148 N. W. 501.

26. **Deeds**—Condition Precedent.—There are no techincal words to distinguish between "conditions precedent" and "conditions subsequent" in deeds. If the thing to be done does not necessarily precede the vesting of the estate in the devisee or grantee but may accompany or follow it, the condition is subsequent.—Hawkins v. Hansen, Kan., 142 Pac. 280.

27.——False Description.—Where part of a description in a deed is plainly false, it should be rejected; but, if enough remains to locate the land, the deed is effective.—Derham v. Hill, Colo., 142 Pac. 181.

28.——Surrender.—Where a grantee surrendered her deed from her father for the purpose of a settlement with the other heirs of the grantor, but no settlement was made, the surrender was without effect.—Mullen v. Flynn, Ore., 142 Pac. 338.

29. **Descent and Distribution**—Advancement. —Substantial gifts by a parent to a child are ordinarily presumed to be advancements, chargeable to the child in the distribution of the donor's estate; and the burden of proof rests on one denying they were advancements. —Lynch v. Culver, Mo., 16 8S. W. 1138.

30. **Ejectment**—Disputed Boundary Line.—Ejectment is the proper remedy to determine a disputed title depending on the true boundary line between adjacent property.—Lehigh Valley Coal Co. v. Midvalley Coal Co., Pa., 91 Atl. 427.

31. **Eminent Domain**—Damages. — Where part of a landowner's property is condemned, his damage should be ascertained by comparing the value of the land before the taking, with the value of what was left after the taking, in view of the new conditions created thereby.—In re City of Meriden, Conn., 91 Atl. 439.

32. **Equity**—Clean Hands.—A person guilty of bad faith, fraud, or any unconscionable act in the transaction which forms the basis of his claim, is entitled to no equitable relief on account of the transaction.—Union Cent. Life Ins. Co. of Ohio v. Drake, U. S. C. C. A., 214 Fed. 538.

33.——Demurrer.—A bill in equity which, though abstract and general and largely a statement of conclusions, states a case entitling complainant to introduce evidence entitling him to relief sought, is not subject to a general demurrer.—Johns v. Bowden, Fla., 66 So. 155.

34. **Executors and Administrators**—Equity.— Where a debt for the benefit of the estate is contracted by an executor, who is insolvent, the debtor may maintain an equitable action in rem against the trust estate.—Miller v. Herzog, 148 N. Y. Supp. 945.

35.——Successor.—At common law an administrator de bonis non could only recover from the personal representative of a deceased administrator or executor property belonging to the decedent remaining in specie.—Denton v. Schneider, Wash., 142 Pac. 9.

36.——Widow's Allowance.—Though a life tenant is usually required to pay taxes, one holding under the widow's quarantine is not chargeable with taxes, nor required to account for rents.—Shoultz v. Lee, Mo., 168 S. W. 1146.

37. **Forcible Entry and Detainer**—Public Land.—A person ousted by an intruder from the quiet possession of government land may sue in forcible entry and detainer, though his possession and occupancy of the land were without right.—Murrah v. Acrey, N. M., 142 Pac. 143.

38. **Fraud**—Negotiable Instrument.—Where a note procured by fraud is negotiated to an innocent purchaser, the maker is damaged so as to be entitled to recover for the fraud, though the note is not due.—Hoffman v. Toft, Ore., 142 Pac. 365.

39. **Frauds, Statute of**—Mineral Lands.—The statute of frauds does not require that the reservation of the right of surface support, in a deed conveying the surface of mineral lands, be signed by the grantee.—Graff Furnace Co. v. Scranton Coal Co., Pa., 91 Atl. 508.

40. **Fraudulent Conveyances** — Burden of Proof.—In a suit to invalidate an assignment as fraudulent as to creditors, the burden of establishing the debtor's insolvency at the time of the assignment and the fraud is on the creditor.—Parkinson Bros. Co. v. Figel, Cal., 142 Pac. 135.

41.——Subsequent Creditor.—A person who has a cause for action for personal injury against a corporation when it transfers all its property, and who recovers judgment thereon after the transfer, being a subsequent creditor, can set aside the transfer only on proof of the corporation's actual intent to defraud its creditors.—Pfisterer v. Toledo, B. G. & S. Traction Co., Ohio, 106 N. E. 18.

42.——Equity.—Where an executor, ordered by the probate court to pay specified sums to enumerated legatees, fled from the state, was insolvent, and fraudulently conveyed her real estate in the state, which was the only source from which the claims could be realized, an attachment was not an adequate remedy, but equity was available to avoid the fraudulent conveyance.—Fraser v. Cole, U. S. C. C. A., 214 Fed. 556.

43. **Gaming**—Action.—In an action to recover the amount of a stake deposited by plaintiff with the other party to a wagering contract, the burden is on plaintiff to show that when he demanded the return of the stake the contingent event which was to determine the bet had not taken place.—Davis v. Fleshman, Pa., 91 Atl. 489.

44. **Guaranty**—Construction.—The words "all liability" in the contract of hypothecation import a continuing guaranty, and not a security for a single sum or exhausted when the loans equal the amount of the note.—First Nat. Bank v. Hancock Warehouse Co., Ga., 82 S. E. 481.

45.——Separate Instrument.—The guaranty of a note or bill made in a separate instrument will not pass by the transfer of the note or bill.—Postlethwaite v. Minor, Cal., 142 Pac. 55.

46. **Homestead**—Alienation.—The status of a homestead does not change the nature of the estate in the property owned by the head of the family, but merely exempts such property from such liabilities and limits the owner's inherent powers of alienation.—Johns v. Bowden, Fla., 66 So. 155.

47. **Indictment and Information**—Ownership of Property.—When the ownership of goods stolen is laid in a corporation, the corporate name must be given, but incorporation need not be alleged if the name imports incorporation.—State v. Adler, Ore., 142 Pac. 344.

48. **Insurance**—Agency.—A provision in a policy that no condition or warranty contained therein can be waived or altered, by any soliciting agent is a valid limitation.—Madsen v. Maryland Casualty Co. of Baltimore, Cal., 142 Pac. 51.

49.——Burden of Proof.—Where a burglary policy insured generally against a particular peril and contained a clause exempting the insurer from liability for loss caused in a certain manner, the burden was on the insurer to prove that the loss fell within the exemption.—Fidelity & Casualty Co. of New York v. First Bank of Fallis, Okla., 142 Pac. 312.

50.——Estoppel.—Where a fire insurance company neglected to promptly settle a loss in accordance with an agreement of the adjuster representing them, the insured was released from the agreement and not precluded by it from claiming the full amount of her loss.—Wanner v. Manufacturers' & Merchants' Mut. Fire Ins. Co., Pa., 91 Atl. 498.

51.——Insurable Interest.—Though a firm has an insurable interest in the life of a partner devoting his skill, knowledge, and experience in the firm business, yet interest in a policy on the life of a partner held by the firm ceases on the dissolution of the firm, and the surviving partner has no interest.—Ruth v. Flynn, Colo., 142 Pac. 194.

52.——Waiver.—Proofs of loss are not waived by answer setting up other grounds as a defense to an action on a fire insurance policy.—Palatine Ins. Co. v. Lynn, Okla., 141 Pac. 1167.

53.——Warranty.—Insured's failure to disclose the existence of a latent defect, concerning which, from the nature of things, he could have no exact information, will not invalidate the policy where he discloses the condition of his health as known to him.—Suravitz v. Prudential Ins. Co. of America, Pa., 91 Atl. 495.

54. **Interest**—Allowance of Claim.—Allowance of a claim against an intestate's estate prior to an order of payment is not a "judgment" bearing interest.—In re Bell's Estate, Cal., 141 Pac. 1179.

55. **Judgment**—Burden of Proof.—The burden of establishing estoppel by prior judgment by proof that the matter in dispute was actually and necessarily litigated in the prior suit is on the party asserting such estoppel.—Union Cent. Life Ins. Co. of Cincinnati, Ohio, v. Drake, U. S. C. C. A., 214 Fed. 536.

56. **Landlord and Tenant**—Appurtenant.—Where there was a way rightfully in use for ingress and egress to land contracted to be leased, such a way is appurtenant to the land and will pass without special description.—Joyce v. Tomasini, Cal., 142 Pac. 67.

57.——Constructive Eviction.—Where a tenant is deprived by his landlord of the beneficial use of the premises and is compelled to abandon them, it is a "constructive eviction," though no actual force is used.—New State Brewing Ass'n v. Miller, Okla., 141 Pac. 1175.

58. **Libel and Slander**—Foreign Language.—While an indictment for criminal libel in a foreign language must set out the libel verbatim, and follow it by a proper translation, held, that a translation of a publication in Japanese verbally differing from the translation made by defendant, but substantially conveying the same idea, was sufficient.—State v. Takeuchi, Wash., 141 Pac. 1145.

59. **Limitation of Actions**—Tolling Statute.—Where plaintiff, to whom deceased had agreed to leave specified realty on her remaining with and caring for him during his declining years, was in possession claiming to own the property, limitations did not run against her right of action against the administrator of the deceased to compel specific performance of the contract.—Clow v. West, Nev., 142 Pac. 226.

60.——Usury.—An agreement between the maker of a usurious note and the holder thereof that suit to determine the question of usury must be brought within six months, held void.—R. J. & B. F. Camp Lumber Co. v. Citizens' Bank of Valdosta, Ga., 82 S. E. 492.

61. **Malicious Prosecution**—Probable Cause.—"Probable cause" is a suspicion founded on

circumstances sufficiently strong to warrant a reasonable man in the belief that the criminal charge is true.—Redgate v. Southern Pac. Co., Cal., 141 Pac. 1191.

62. **Marriage**—Common-Law.—A "common-law marriage" exists where competent persons agree to be and become immediately man and wife and pursuant thereto enter into and maintain the marriage relation.—In re Love's Estate, Okla., 142 Pac. 305.

63. **Master and Servant**—Employers' Liability Act.—Whether a defective board on the tender of an engine on which plaintiff attempted to jump and was injured was a "running-board," within Federal Employers' Liability Act, prohibiting the use of defective running-boards, was for the jury.—Bramlett v. Southern Ry. Co., S. C., 82 S. E. 501.

64.——Negligence.—Where an elevator was negligently moved from the basement and the doors left open by plaintiff's fellow servant, so that plaintiff, in the darkness, believing the elevator where he had left it, walked into the elevator well and was injured, the negligence of the fellow servant was an intervening proximate cause, precluding a recovery for the master's negligence in omitting to comply with the statutory duty to equip the elevator with automatic gates.—Thomas v. German General Benev. Society, Cal., 141 Pac. 1186.

65.——Ordinary Care.—A railroad company, receiving a freight car of another company, owes to its employes, who are to handle the car, the duty of exercising ordinary care to discover defects in the car and equipment.—Near v. St. Louis & S. F. R. Co., Mo., 168 S. W. 1186.

66.——Statutory Violation.—Failure of an employer to place guards on moving cogwheels is negligence where the guarding of such wheels is not impracticable.—Fortney v. Breon, Pa., 91 Atl. 525.

67. **Mines and Minerals**—Surface Rights.—Where the owner of the entire estate grants the surface, reserving the mineral estate, without liability for damages to the surface, the grantor may remove all the minerals without supporting the surface.—Graff Furnace Co. v. Scranton Coal Co., Pa., 91 Atl. 508.

68. **Mortgages**—Interest.—Where a note provides for interest at 6 per cent, payable annually, but not paid when due, it shall be added to the principal and draw 10 per cent. the interest is payable annually, and, upon default, an action may be maintained therefor.—F. B. Collins Inv. Co. v. Sanner, Okla., 142 Pac. 318.

69. **Municipal Corporations**—Abutting Owners.—Where the city vacates a street ,the land embraced therein at once attaches itself to the abutting lots in proportion to the frontage, and becomes the property of the abutting lot owners.—Edwards v. Smith, Okla., 142 Pac. 302.

70.——Enacting Clause.—Omission of an enacting clause will not invalidate a city ordinance.—City of Cartersville v. McGinnis, Ga., 82 S. E. 487.

71.——Governmental Duty.—Where the charter grants a municipality power to exercise a necessary govermental duty, a municipality, upon acceptance of the charter, is bound to exercise the power.—State v. McMahon, Conn., 91 Atl. 445.

72.——Ordinance.—Where the complaint in action against a city for injuries from a defective sidewalk alleged that the city officers failed in their duties relative to the sidewalk, city ordinances relating to such duties were admissible evidence.—City of Bessemer v. Whaley, Ala., 66 So. 145.

73. **Negligence**—Imputability.—A passenger in an automobile is not barred from recovering for an injury by the contributory negligence of the driver.—United Rys. & Electric Co. of Baltimore v. Crain, Md., 91 Atl. 405.

74. **Nuisance**—Abatement.—A village, being entitled to sue in a proper court, is a proper party plaintff to sue to abate a public nuisance causing injury to its rights, morals, or interest, though such nuisance be outside its boundaries. —Village of American Falls v. West, Idaho, 142 Pac. 42.

75.——Drain.—Maintenance of a drain, in a private alley belonging to a city, and a gasoline tank, from which gasoline escaped and spread over water in the alley from an obstruction of the drain, and, becoming ignited, caused an explosion, which injured plaintiff, held not to constitute a private nuisance.—De Moll v. City of New York, 148 N. Y. Supp. 966.

76. **Partnership**—Sharing Profits.—Sharing profits does not of itself necessarily constitute a partnership, but merely tends to show that the person entitled to share profits is a partner.—Richardson v. Keely, Colo., 142 Pac. 167.

77. **Railroads**—Negative Evidence. — Where trainmen testify affirmatively that the whistle was blown for a crossing, the testimony of witnesses merely that they did not hear the whistle is not sufficient to take the question to the jury unless for some reason their attention was attracted thereto.—United Rys. & Electric Co. of Baltimore v. Crain, Md., 91 Atl. 405.

78. **Release**—Joint Tort-Feasors.—An unqualified release under seal of one joint tort-feasor releases the other, but a mere covenant not to sue has no such effect.—Johnson v. Von Scholley, Mass., 106 N. E. 17.

79. **Sales**—Conditional Sale.—Recording of a conditional bill of sale held void, where the attesting notary was an officer and stockholder in the selling corporation.—Davis v. Banks, Ga., 82 S. E. 497.

80.——Damages.—Where a contract for sale of flour for future delivery does not call for the manufacture of particular wheat into the flour, the decline of price of wheat is not an element of damages for breach of contract by the buyer.—Russell Miller Milling Co. v. Bastasch, Ore., 142 Pac. 355.

81. **Seduction**—Chastity.—Chastity of the prosecutrix was presumed, notwithstanding the presumption of innocence in favor of accused, but, if there was evidence sufficient to create a reasonable doubt as to her chastity, there could be no conviction.—State v. Jones, Wash., 142 Pac. 35.

82. **Specific Performance** — Abatement of Price.—Where a vendor does not have title to all the land which he contracts to sell, the purchaser may compel him to convey the title he has with an abatement of the price.—Barthel v. Engle, Mo., 168 S. W. 1154.

83. **Telegraphs and Telephones**—Forged Telegram.—Where a telegraph company exercises reasonable care in the transmission of telegrams, it is not liable for damages from the delivery of a forged telegram, though it failed to satisfy itself of the identity of the person delivering the message for transmission.—State Bank of Commerce of Clayton v. Western Union Telegraph Co., N. M., 142 Pac. 156.

84.——Mental Suffering.—Where the only injury resulting from negligent delay in the transmission of a telegram is mental suffering, damages are not recoverable, in the absence of statute.—Corcoran v. Postal Telegraph-Cable Co., Wash., 142 Pac. 29.

85. **Trusts**—Breach.—While the investment of trust funds in securities not expressly authorized by statute may render the trustee liable for loss from depreciation, it is not a breach of trust.—In re Darlington's Estate, Pa., 91 Atl. 486.

86.——Constructive Trust.—Where a trustee purchases property with the trust funds and takes the title, the beneficiary may fasten the trust on the purchased property or proceed against the trustee personally.—Bettencourt v. Bettencourt, Ore., 142 Pac. 326.

87.——Discretion.—Where the law determines that the discretion of a trustee should be exercised in a particular way, he will be required to act in accordance therewith.—In re Harrar's Estate, Pa., 91 Atl. 503.

88. **Wills**—Construction.—A bequest to testator's daughters living and unmarried at the time of his death to be paid to them severally on their marriage, held to vest at testator's death, and on their surviving him and dying unmarried, the legacy passed to their personal representatives.—In re Moses, 148 N. Y. Supp. 975.

89.—Validity.—The validity of a will must be determined by the law in force at the time of the death of the testator.—Phillips v. Phillips, Del., 91 Atl. 452.